APPENDIX.

Court of Appeals Order, September 8, 1982.

STATE OF NEW YORK,

COURT OF APPEALS.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of September A. D. 1982

Present:

Hon. Lawrence H. Cooke, Chief Justice, presiding.

3 Mo. No. 707

IN THE MATTER

OF

THE CITY OF PLATTSBURGH,

Respondent,

vs.

TERRACE WEST, Inc.,

Appellant,

and

THE STATE OF NEW YORK,

Intervenor.

Court of Appeals Order, September 8, 1982

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements relating to opposing affidavits only.

JOSEPH W. BELLACOSA
Clerk of the Court

Appellate Division Order, May 18, 1982.

At a Motion Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, on the 19th day of April 1982.

Present:

Hon. T. Paul Kane,
Justice Presiding.
Hon. Robert G. Main,
Hon. John T. Casey,
Hon. Ann T. Mikoll,
Hon. Paul J. Yesawich, Jr.,
Associate Justices.

CITY OF PLATTSBURGH, NEW YORK,

Petitioner-Respondent,

against

TERRACE WEST, Inc.,

Respondent-Appellant,

and

THE STATE OF NEW YORK,

Intervenor.

Order 41275

Appellate Division Order, May 18, 1982

A motion having been made by the respondent-appellant at this Term of Court in the above-entitled proceeding for an order granting respondent-appellant the right to reargue, or in the alternative, for leave to appeal to the Court of Appeals, upon certified questions, from the order of this Court, entered on March 30, 1982, affirming an order of the Supreme Court, Clinton County, granting petitioner-respondent's application for leave to file an acquisition map in the Clinton County Clerk's office, thereby vesting title to certain property in petitioner-respondent: now, after reading and filing proof of due service of the notice of motion, the affirmation of J. Byron O'Connell, Esq., dated April 7, 1982, in support of the motion, the answering affidavit of Thomas A. Robinson, Esq., sworn to April 14, 1982, in opposition thereto, and the affidavit of Stanley Fishman, Esq., sworn to April 16, 1982, in opposition thereto, and the Court having rendered a decision on the 11th day of May, 1982, it is hereby

ORDERED, that the motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals, be and the same hereby is denied, without costs.

ENTER,

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: May 18, 1982

A true Copy
JOHN J. O'BRIEN
Clerk

Appellate Division Decision, May 11, 1982.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

May 11, 1982

41275

IN THE MATTER

OF

CITY OF PLATTSBURGH, NEW YORK,

Respondent,

v.

TERRACE WEST, Inc.,

Appellant,

and

STATE OF NEW YORK,

Intervenor-Respondent.

Motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals denied, without costs.

Kane, J. P., Main, Casey, Mikoll and Yesawich, Jr., JJ., concur.

Appellate Division Order, March 30, 1982.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 8th day of February 1982.

Present:

Hon. T. Paul Kane,
Justice Presiding.
Hon. Robert G. Main,
Hon. John T. Casey,
Hon. Ann T. Mikoll,
Hon. Paul J. Yesawich, Jr.,
Associate Justices.

CITY OF PLATTSBURGH, NEW YORK,

Petitioner-Respondent,

against

TERRACE WEST, Inc.,

Respondent-Appellant,

and

THE STATE OF NEW YORK,

Intervenor-Respondent.

Order 41275

Appellate Division Order, March 30, 1982

The appellants having appealed from an order of the Supreme Court at Special Term (Shea, J), entered June 12, 1981, in Clinton County, which in a proceeding pursuant to Article 4 of the Eminent Domain Procedure Law, granted the application of petitioner for leave to file an acquisition map in the Clinton County Clerk's Office, thereby vesting title to certain property in petitioner, and said appeal having been presented during the above-stated Term of this Court, and having been argued by Thomas A. Robinson, Esq., of counsel for petitioner-respondent, Stanley Fishman, Assistant Attorney General, of counsel for intervenor-respondent, and by Michael J. Howley, Esq., of counsel for respondent-appellant, and, after due deliberation, the Court having rendered a decision on the 25th day of March, 1982, it is hereby

ORDERED, that the order appealed from be and the same hereby is affirmed, with one bill of costs to respondents on the appeal.

ENTER,

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: March 30, 1982.

A True Copy:
JOHN J. O'BRIEN
Clerk

Appellate Division Decision, March 25, 1982.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

March 25, 1982 41275

IN THE MATTER

OF

CITY OF PLATTSBURGH, NEW YORK,

Respondent,

v.

TERRACE WEST, Inc.,

Appellant,

and

STATE OF NEW YORK,

Intervenor-Respondent.

Appellate Division Decision, March 25, 1982

Appeal from an order of the Supreme Court at Special Term (Shea, J.), entered June 12, 1981 in Clinton County, which, in a proceeding pursuant to article 4 of the Eminent Domain Procedure Law, granted the application of petitioner for leave to file an acquisition map in the Clinton County Clerk's Office, thereby vesting title to certain property in petitioner.

At issue on this appeal is the proposed taking by petitioner City of Plattsburgh, New York, of a private driveway owned by respondent Terrace West, Inc. The pertinent underlying facts are set forth in our earlier decision in *Matter of Terrace West v. City of Plattsburgh* (73 A D 2d 763, app. dsmd. 49 N Y 2d 916). After Special Term granted petitioner leave to file an acquisition map and thereby acquire title to the subject parcel, respondent filed this appeal wherein it contends that New York's Eminent Domain Procedure Law is unconstitutional because it permits the taking of property without a jury trial even though such a trial is allegedly mandated by section 7 (subd. [c]) of article I of the New York State Constitution.

We hold that the challenged order should be affirmed. Even if we assume tha this appeal is not precluded on the theory of collateral estoppel, a doubtful proposition in that we have previously held that the appropriation in question "is a constitutionally permissible taking for a public purpose" (*Matter of Terrace West v. City of Plattsburgh, supra,* p. 763), we must nonetheless conclude that respondent's arguments are without merit. The constitutional provision cited above upon which respondent relies is plainly inapplicable in this instance because it clearly relates to a private taking of property for the opening of a private road and not to the situation presented here

wherein it has been judicially determined that petitioner is taking property for a public purpose. Moreover, the differences between public and private takings are obvious, and respondent has, therefore, not been denied the equal protection of the law merely because different procedures have been established with regard to public and private takings (cf. *Neale v. Hayduk*, 35 N Y 2d 182, 186; *8200 Realty Corp. v. Lindsay*, 27 N Y 2d 124, app. dsmd. 400 U.S. 962).

Order affirmed, with one bill of costs to respondents on appeal.

Kane, J. P., Main, Casey, Mikoll and Yesawich, Jr., JJ., concur.

Order Appealed From, June 5, 1981.

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Clinton at the Clinton County Government Center in the City of Plattsburgh, New York on the 26th day of February, 1981.

Present:

Hon. Edmund Shea,
Justice.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF CLINTON.

CITY OF PLATTSBURGH, NEW YORK,

Petitioner,

against

TERRACE WEST, Inc.,

Respondent.

The petitioner above named having applied to this Court for permission to file an acquisition map in the office of the Clerk of the County of Clinton, and upon

granting of said order, for vesting of title of certain property in the petitioner, and the matter having come on to be heard at a Special Term of this Court held in and for the County of Clinton at the Clinton County Government Center in the City of Plattsburgh, New York on the 26th day of February, 1981, and the petitioner having appeared by Thomas A. Robinson, Esq., Corporation Counsel of the City of Plattsburgh, New York, and the respondent having appeared by O'Connell & Wolfe, Esqs., J. Byron O'Connell, Esq., of counsel, in opposition thereto, and David L. Smith, Esq., Assistant Attorney General of the State of New York, having appeared on behalf of the people of the State of New York;

Now, upon reading and filing the notice of petition dated the 12th day of January, 1981; the petition verified December 30, 1980; the answer of the respondent verified February 12, 1981; the reply of the petitioner verified February 25, 1981; the notice of pendency of this proceeding with proof of publication and service thereof; and the petitioner having produced at the hearing the proposed acquisition map and the following copies of documents and decisions in prior proceedings in this matter, viz: resolution of the Common Council of the City of Plattsburgh held August 16, 1979; public notice of determination by the City of Plattsburgh; notice and petition for review by Appellate Division, Third Department; answer of City of Plattsburgh to petition for review; decision of Appellate Division, Third Department, dated December 20, 1979; notice of motion by Terrace West, Inc. for reargument in Appellate Division, Third Department; answering affidavit on behalf of City of Plattsburgh to motion for permission to reargue; reply affidavit of Terrace West, Inc. on motion to reargue; notice of appeal by Terrace West,

Inc. to the Court of Appeals; City of Plattsburgh's motion to dismiss appeal to the Court of Appeals; Appellate Division decision denying motion for reargument; Terrace West, Inc's answering affidavit to City's motion to dismiss appeal in the Court of Appeals; Appellate Division order denying motion for reargument; order of the Court of Appeals dismissing appeal; summons and complaint in United States District Court; City's answer and answering affidavit; order to show cause in United States District Court; City's memorandum in United States District Court; City's memorandum of law on question or jurisdiction in United States District Court; Terrace West, Inc's application for three judge court in United States District Court; Terrace West, Inc's amended complaint in United States District Court; Terrace West, Inc's memorandum in United States District Court; City's answer to amended complaint and reply memorandum on jurisdictional question; memorandum decision and order in United States District Court; order of the United States District Court dismissing complaint; notice of appeal to United States Court of Appeals, Second Circuit; notice of dismissal of appeal by United States Court of Appeals, Second Circuit; and due deliberation having been had, and the Court having handed down its written decision dated May 18, 1981;

Now, on motion of Thomas A. Robinson, Esq., attorney for petitioner, it is

ORDERED that the petition of the City of Plattsburgh, New York be and it hereby is granted and that the proposed acquisition map be filed in the office of the Clerk of the County of Clinton, State of New York, and that upon such filing, title to the following property be vested in the City of Plattsburgh, New York:

Order Appealed From, June 5, 1981

All that certain parcel of land, situate in the City of Plattsburgh, County of Clinton, State of New York, bounded and described as follows: BEGINNING at a point, which point is in the westerly bound of Cogan Avenue and is 386.98 ft. southerly of the south bound of Cornelia Street; and running thence in a westerly direction along the south bound of Lands owned by Dorothy Cogan McDonough a distance of approximately 316.90 ft. to a point, which point is the intersection determined by the continuation of the westerly boundary line of proposed Sandra Avenue; thence southerly along the extended west bound of proposed Sandra Avenue a distance of 66.62 ft. more or less, to a point which is the northwest corner of Lot #27 as shown on the Sandra Avenue Subdivision map #SC-377 drawn by Joseph J. Martina, P.E., L.S.; thence easterly along a line 66 feet distant from the parallel with the south bound of said Doroth Cogan McDonough property a distance of 308.86 feet to an iron pipe set in the west bound of Cogan Avenue; thence northerly a distance of 66.01 ft. to the place of beginning.

Enter:

EDMUND L. SHEA
J. S. C.

Dated: June 5, 1981.

Memorandum Decision and Order, U.S. District Court for Northern District of New York, July 18, 1980.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

TERRACE WEST, Inc.,

Plaintiff,

v.

THE CITY OF PLATTSBURGH, NEW YORK,

Defendant.

80-CV-318

Appearances:

O'Connell and Wolfe, Attorneys for Plaintiff, Ten Healy Avenue, Plattsburgh, New York 12901.

Of Counsel: J. Byron O'Connell, Esq.

Thomas A. Robinson, Esq., Corporation Counsel, Attorney for Defendant, 55 Court Street, Plattsburgh, New York.

Memorandum Decision and Order, U.S. District Court for Northern District of New York, July 18, 1980

NEAL P. MCCURN, D. J.:

In this civil rights action brought against the City of Plattsburgh pursuant to 42 U.S.C. §1983,[1] plaintiff seeks a declaration from the Court that Article 2 of the Eminent Domain Procedure Law ("EDPL") of the State of New York is unconstitutional. In addition, plaintiff requests that the defendant be enjoined from taking any actions which would further impair its rights in a private road owned by it and previously taken by the defendant City in accordance with the challenged procedure.

The action is presently before the Court on plaintiff's motion for a preliminary injunction. Defendant, in opposing the motion has raised a question as to whether the Court should assume jurisdiction over this lawsuit in light of a previous State Court proceeding between the parties in which plaintiff initially challenged the constitutionality of the EDPL. Although defendant failed to bring a formal motion to dismiss the complaint, the Court in consideration of the accepted principles of federal-state comity, informed the parties at oral argument on the preliminary injunction motion that the question of whether the Court should assume jurisdiction in this case would be decided prior to a determination of plaintiff's motion. Both

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[1]Plaintiff also alleges that this action falls under 42 U.S.C. §1981. However, that position is clearly erroneous as there has been no claim made of racial discrimination as required under that provision. See *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976).

parties were given the opportunity to submit additional affidavits and legal memoranda on the jurisdictional issue.[2]

Background

Plaintiff is the owner of what has been described alternately as a private road and a driveway, located in the City of Plattsburgh, New York. The road was condemned by the defendant City in order to facilitate the development of six privately owned building lots located at its northern terminus.

The City, in accordance with the procedures set forth in Article 2 of the EDPL (§§201-208), presented its plan for the establishment of a water line and vehicular access to the areas to be developed at a public hearing. (EDPL §203). Subsequent to the hearing, findings and a determination allowing the project were published in accordance with EDPL §204. Plaintiff, claiming that the taking of its property was not for a public purpose but for the benefit of the private builders who own the lots to be developed, sought review of the findings and determination in the Appellate Division of the Supreme Court of the State of New York, Third Department, pursuant to the judicial review provision at EDPL §207(A).[3]

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[2]The Court also informed the parties that if a decision to assume jurisdiction was made that plaintiff would be given an opportunity for a hearing on the question of irreparable injury with regard to its application for preliminary relief. Notice of the filing of the action has been given to the New York State Attorney General in accordance with the requirements of 28 U.S.C. §2403(b).

[3]Section 207(A) provides in pertinent part that: (A)Any person or persons jointly or severally, aggrieved by the condemnor's determination and findings made pursuant to this article may seek judicial review thereof by the appellate division of the supreme court . . . .

Memorandum Decision and Order, U.S. District Court for Northern District of New York, July 18, 1980

The Appellate Division, in a decision dated December 20, 1979, confirmed the determination finding that "[t]he acquisition of land for a street and water system is a constitutionally permissible taking for a public purpose." Obviously dissatisfied with the determination, plaintiff, on January 3, 1980, moved for reargument, challenging for the first time the constitutionality of Article 2 of the EDPL, as in violation of the Fourteenth Amendment to the United States Constitution and Article I, §§6 and 7 of the New York State Constitution.

According to the parties to this action plaintiff's motion for reargument was denied by the Appellate Division.[4] Plaintiff filed a notice of appeal on January 24, 1980, asserting entitlement to an appeal as a matter of right pursuant to EDPL §§207 and 208.[5] In a statement filed pursuant to section 500.2 of the Rules of the Court of Appeals, plaintiff at paragraph "9" asserted that the EDPL is unconstitutional and confirmed that notice of the constitutional challenge had been given in writing to the Attorney General for the State of New York.[6]

[4]Although the papers submitted to the Court in this action do not include an order of the Appellate Division specifically denying reargument, the parties agree that such action was taken by the Court.

[5]In an affidavit submitted by the defendant, the Mayor of Plattsburgh stated that the notice of appeal to the Court of Appeals was filed before a determination had been made on the reargument motion. It is unclear from the papers whether that is in fact so. However, it is clear that plaintiff did raise the constitutionality argument in papers submitted to the Court of Appeals.

[6]Section 500.2 sets forth the Court rule for the filing and service of an appellant's jurisdictional statement. The section provides in part that:

Where a party will assert that a statute is unconstitutional notice of this assertion shall be given to the Attorney General in writing at the time of filing this jurisdictional statement and a certification to such effect shall be included in this statement.

Memorandum Decision and Order, U.S. District Court for Northern District of New York, July 18, 1980

The City of Plattsburgh moved to dismiss the appeal and by order dated March 20, 1980, the Court of Appeals granted the motion "upon the ground that no substantial constitutional question is directly involved." Plaintiff did not seek an appeal to the Court of Appeals by permission pursuant to New York CPLR §5602, nor did he seek review of the State action in the United States Supreme Court. Rather, plaintiff abandoned the State action and brought this action in federal district court under §1983.

Defendant, as previously indicated, assumes the position that this lawsuit must be dismissed on the grounds of *res judicata,* collateral estoppel and comity, arguing that the plaintiff's constitutional claim was raised and decided by the State Courts in the review proceeding brought pursuant to EDPL §207(A). Plaintiff, on the other hand, claims that the Appellate Division by denying reargument and the Court of Appeals by dismissing plaintiff's appeal, failed to decide the constitutional issues raised by it in those Courts. Thus, according to plaintiff, it should now be allowed to raise the constitutional claim anew in this Court. This Court disagrees and for the reasons discussed below dismisses the plaintiff's complaint on the grounds of *res judicata,* collateral estoppel and the principles of federal-state comity.

Discussion

Under the traditional doctrine of *res judicata:*

> a valid final judgment on the merits operates to bind the parties both as to the issues actually litigated and determined in the first action and as to

> those issues which might have been, but were not actually raised and decided in that first action.

Ornstein v. Regan, 574 F.2d 115, 117 (2d Cir. 1978) citing *Saylor v. Lindsley,* 391 F.2d 965, 968 (2d Cir. 1968). Although the Second Circuit has adopted a policy precluding the application of the *res judicata* doctrine in civil rights cases as to constitutional issues which might have been but were not raised and litigated in an earlier State Court proceeding, *Tomanio v. Board of Regents,* 603 F.2d 255, 258 (2d Cir. 1979), rev'd on other grounds U.S. , 48 U.S.L.W. 4556 (May 19, 1980); *Ornstein v. Regan, supra,* 574 F.2d at 117; *Lombard v. Board of Education,* 502 F.2d 631, 635-37 (2d Cir. 1974), *cert. denied* 420 U.S. 976, 95 S.Ct. 1400, 43 L.Ed.2d 656 (1975), decisions on the issue, "have rather clearly established that where a constitutional issue has been actually raised and determined in the State Court and was necessary to that decision, it may not be relitigated in a §1983 action." *Dieffenbach v. Attorney General of Vermont,* 604 F.2d 187, 198 (2d Cir. 1979). See also *Winters v. Lavine,* 574 F.2d 46 (2d Cir. 1978); *Ellentuck v. Klein,* 570 F.2d 414 (2d Cir. 1978); *Turco v. Monroe County Bar Ass'n.,* 554 F.2d 515 (2d Cir. 1977), *cert. denied* 434 U.S. 834, 98 S.Ct. 122, 54 L.Ed.2d 95 (1977).[7]

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[7]The cases addressing the issue have been decided through the application of both *res judicata* and collateral estoppel. Collateral estoppel precludes the relitigation only of issues which were raised and determined in the first action against the party raising them in the second action and which were necessary to the prior decision. As pointed out by the Court in *Winters v. Lavine, supra,* 574 F.2d at 57, it is sometimes easier to analyze a case like the present one as involving collateral estoppel rather than the modified *res judicata* principles applied to §1983 civil rights cases since it avoids the necessity of determining whether the cause of action in the second action is the same as that in the first as required for the application of *res judicata* but not collateral estoppel.

Memorandum Decision and Order, U.S. District Court for Northern District of New York, July 18, 1980

Plaintiff does not deny raising the constitutional claims presently before this Court in the prior State Court proceeding. However, plaintiff asks this Court to interpret the Appellate Division's silence on the constitutionality issue raised in the motion to reargue, and the Court of Appeal's dismissal of its appeal, as a failure on the part of those Courts to rule up on the constitutionality of Article 2 of the EDPL.

The Court does not doubt that a determination of the effect of the prior State Court litigation would be much simpler had the plaintiff sought a declaration as to the constitutionality of Article 2 of the EDPL from the outset of the State proceedings and had the State Courts addressed the issue of constitutionality head on.[4] Unfortunately, that is not the case. Nonetheless, this Court cannot view the silence of the State Courts with regard to the constitutional challenge as a failure on their part to address and decide upon the constitutionality of Article 2 of the EDPL. See *Winters v. Lavine, supra,* 574 F.2d at 61; *Lecci v. Cahn,* 493 F.2d 826, 830 (2d Cir. 1974); *Tang v. Appellate Division,* 487 F.2d 138, 141 n.2 (2d Cir. 1973), *cert. denied,* 416 U.S. 906, 94 S.Ct. 1611, 40 L.Ed.2d 111 (1974).

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[4]The scope of review available in the Appellate Division of the State Supreme Court under the EDPL is defined at §207 of the Law and includes a review of whether "the proceeding was in conformity with the federal and state constitutions." It would appear that the plaintiff's constitutional challenge would fall within that subsection.

In any event, the New York Court of Appeals, while recognizing that constitutional challenges should as a rule be brought by way of a declaratory judgment action, has allowed the determination of constitutional issues raised in other types of actions where the necessary parties were before the Court and the constitutional matter had been briefed by the parties. *Kovarsky v. Housing and Development Adm.,* 31 N.Y.2d 184, 335 N.Y.S.2d 383, 286 N.E.2d 882 (1972).

Memorandum Decision and Order, U.S. District Court for Northern District of New York, July 18, 1980

The silence of the Appellate Division on plaintiff's constitutional argument as contained in its motion to reargue is immaterial to the determination of whether the issue was decided by the Court. The constitutionality of Article 2 of the EDPL was distinctly challenged in the papers submitted to the Court by plaintiff on its motion to reargue. Once the constitutional challenge to the law under which the taking then under review by the Court had been accomplished had been placed before the Court, determination by that Court of the constitutionality of the law was absolutely necessary to an affirmance of the taking under it.

The plaintiff's constitutional challenge as previously discussed was also clearly presented to the Court of Appeals which ultimately dismissed the appeal upon the ground that no substantial constitutional question was directly involved. The Second Circuit had previously instructed that "a dismissal by the New York Court of Appeals for want of a substantial constitutional question is 'tantamount to a dismissal of the constitutional issues on the merits.' *Turco v. Monroe County Bar Ass'n.* [*supra,* 554 F.2d at 521]." *Ellentuck v. Klein, supra,* 570 F.2d at 422.'

'The Second Circuit in *Winters v. Lavine, supra,* 547 F.2d at 61 suggested that the New York Court of Appeals often dismisses appeals for lack of a substantial constitutional issue directly involved in cases in which the decision of the lower court could have been based on alternative grounds, one of which did not raise constitutional issues, and each of which was sufficient to support a judgment. In such a case, the appellant has the burden of demonstrating to the Court that the construction of the constitution was necessarily involved in the decision below. *Haydorn v. Carroll,* 225 N.Y. 84, 88, 121 N.E. 463 (1918).

The present case does not fall within that category since a determination with regard to plaintiff's constitutional claim was clearly necessary to an affirmance of the taking under the challenged law.

Memorandum Decision and Order, U.S. District Court for Northern District of New York, July 18, 1980

The law is well settled that "[f]ederal courts do not sit to review determinations of state courts' [*Mitchell v. National Broadcasting Co.*, 553 F.2d 265, 273 (2d Cir. 1977)], whose judges are as beholden to the Constitution as are we, as federal judges." *Ellentuck v. Klein, supra,* 570 F.2d at 425. A determination by this Court that the New York State Courts ignored the challenge to the constitutionality of Article 2 of the EDPL and went on to uphold a condemnation completed in accordance with the procedures would be to attribute to those Courts a failure to abide by that duty. There is simply no basis for reaching such a startling conclusion.

Since the plaintiff's challenge to the constitutionality of Article 2 of the EDPL was raised and necessarily decided in the State Courts of New York State in a prior proceeding involving the same parties, and since the plaintiff failed to seek review in the United States Supreme Court, this Court is precluded from deciding the question anew.[10] Therefore, for the reasons discussed above, the plaintiff's complaint is hereby dismissed.

It is so ordered.

Dated: Syracuse, New York
July 18, 1980

NEAL P. McCURN
U.S. District Judge

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[10]Although the Court has based its decision primarily on the principles of *res judicata,* collateral estoppel and federal-state comity, the same result would have been reached through the application of 28 U.S.C. §1738 which obligates federal courts to give full faith and credit to judgments entered by state courts of competent jurisdiction.

Appellate Division Order, February 25, 1980.

At a Motion Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York on the 14th day of January, 1980.

Present:

Hon. A. Franklin Mahoney,
Presiding Justice
Hon. Michael E. Sweeney
Hon. T. Paul Kane
Hon. Ellis J. Staley, Jr.
Hon. J. Clarence Herlihy,
Associate Justices.

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER

OF

TERRACE WEST, Inc.,

Petitioner,

against

CITY OF PLATTSBURGH,

Defendant.

Appellate Division Order, February 25, 1980

A motion having been made by Terrace West, Inc. at this term of court in the above entitled proceeding for an order granting permission to reargue the appeal; now, after reading and filing proof of due service of the notice of motion, the affidavit of J. Byron O'Connell, Esq. verified January 3, 1980 in support of the motion and the affidavit of Thomas A. Robinson, Esq., sworn to January 10, 1980 in opposition thereto, and the Court having rendered a decision on the 7th day of February, 1980, it is hereby

ORDERED that the motion for reargument be and the same hereby is denied, without costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: February 25, 1980.
A True Copy:
JOHN J. O'BRIEN
Clerk

Appellate Division Decision, February 7, 1980.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

February 7, 1980

IN THE MATTER

OF

TERRACE WEST, Inc.,

Petitioner,

v.

CITY OF PLATTSBURGH,

Respondent.

36591

Motion for reargument denied, without costs.

Mahoney, P.J., Sweeney, Kane, Staley, Jr. and Herlihy, JJ., concur.

Appellate Division Order, January 14, 1980.

At a Term of the Appellate Division of the State of New York held in and for the Third Judicial Department at the Justice Building in the City of Albany, New York commencing on the 13th day of November, 1979.

Present:

Hon. A. Franklin Mahoney
Presiding Justice
Hon. Michael E. Sweeney
Hon. T. Paul Kane
Hon. Ellis J. Staley, Jr.
Hon. J. Clarence Herlihy
Associate Justices

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER
OF
TERRACE WEST, Inc.,
Petitioner,

against

CITY OF PLATTSBURGH,
Defendant.

Appellate Division Order, January 14, 1980

The above named petitioner having instituted a proceeding in this court pursuant to Section 207 (subd. [A]) of the Eminent Domain Procedure Law for a review of the determination and findings of the City of Plattsburgh relative to the public need for and environmental and other effect of the Sandra Avenue Improvement Project;

Now, on reading and filing the notice of motion and petition sworn to October 16, 1979 and the answer of the respondent and answering affidavit of John L. Ianelli sworn to October 26, 1979, and said proceeding having been presented during the above stated term by O'Connell & Wolfe, Esqs., of counsel for petitioner, and by Thomas A. Robinson, Esq., of counsel for respondent City of Plattsburgh, and after due deliberation, the Court having rendered a decision on the 20th day of December, 1979, it is hereby

ORDERED that the determination be confirmed and the petition dismissed with costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: January 14, 1980.
A True Copy:
JOHN J. O'BRIEN
Clerk

Appellate Division Decision, December 20, 1979.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

December 20, 1979 36591

IN THE MATTER

OF

TERRACE WEST, Inc.,

Petitioner,

v.

CITY OF PLATTSBURGH,

Respondent.

Proceeding instituted in this court, pursuant to section 207 (subd. [A]) of the Eminent Domain Procedure Law, to review the Determination and Findings of the City of Plattsburgh relative to the public need for, and environmental and other effect of the Sandra Avenue Improvement Project.

At issue in this proceeding is whether the proposed taking of a paved driveway owned by petitioner to facilitate the development of six privately owned building lots at the

northern terminus of that driveway is for a public or private use. At the required public hearing, the City of Plattsburgh presented its plan for the establishment of a water line and vehicular access to the area to be developed. Following the hearing, findings and a determination providing for such a project were duly published (EDPL, §§ 201-204). It is petitioner's contention, upon review of those findings and determination, that the taking of this property is only for the benefit of private builders who own the lots to be developed (EDPL, §207).

The acquisition of land for a street and water system is a constitutionally permissible taking for a public purpose (*Denihan Enterprises, Inc. v. O'Dwyer*, 302 N.Y. 451; *Evans v. State of New York*, 34 A.D. 2d 1007, affd. 28 N. Y. 2d 844). The fact that incidental private profit may accrue is insufficient to defeat the condemnation (*Matter of Murray v. LaGuardia*, 291 N.Y. 320, cert. den. 321 U.S. 771).

Determination confirmed, and petition dismissed, with costs.

Mahoney, P.J., Sweeney, Kane, Staley, Jr., and Herlihy, JJ., concur.

Minutes of Public Hearing.

MINUTES of a PUBLIC HEARING held in the Common Council Chambers, City Hall, Plattsburgh, New York, *on July 26, 1979 at 6:00 P.M. in connection with the Sandra Avenue Improvement Project.*

PRESENT: Mayor Ianelli, Aldermen Stewart, Baughn, LePage, Blumette, Ryder and Poitras.

ABSENT:

Mayor: This is a public hearing on the Sandra Avenue Improvement Project and this covers the connecting of a public street with Sandra Avenue to provide for the extension of water lines and servicing the area. The Sandra Avenue improvement project will be located within the following geographical boundaries.

ALL that certain parcel of land, situate in the City of Plattsburgh, County of Clinton, State of New York, bounded and described as follows: Beginning at a point, which point is in the westerly bound of Cogan Avenue and is 400 feet southerly of the south bound of Cornelia Street, and running thence in a westerly direction along the south bound of lands owned by Dorothy Cogan McDonough a distance of approximately 308 feet, to a point, which point is the intersection determined by the continuation of the westerly boundary line of proposed Sandra Avenue; thence southerly along the extended west bound of proposed Sandra Avenue a distance of 67 feet, more or less, to a point which is the northwest corner of Lot #27 as shown on the Sandra Avenue Subdivision map #SC-377 drawn by Joseph J. Martina, P.E., L.S.; thence easterly along a line 66 feet distant from and parallel with the

south bound of said Dorothy Cogan McDonough property a distance of 308.86 feet to an iron pipe set in the west bound of Cogan Avenue; thence northerly a distance of 66 feet to the place of beginning.

If there is anyone that has a statement to make to the Council on this public hearing, we will entertain it now. We do have one written statement that came in Gentlemen, and I think I will read it now for the Minutes, and I'll pass you each a copy. This statement is from Louis E. Wolfe, President of Terrace West, Inc.

"7/26/79
MEMO:

FROM: Louis E. Wolfe, President
Terrace West, Inc.

TO: The Mayor and Aldermen of the City of Plattsburgh

I do not believe that the condemnation of the property running in a general westerly direction from Cogan Avenue to a point at the Western intersecting line of Sandra Avenue is for a public purpose. My reasons for stating this are as follows:

That when the predecessors to the present owners attempted to have Sandra Avenue accepted as a public street, they approached the City and went before the Planning Board and were told that it could not be accepted as a public street until the acquisition of the Terrace West Driveway, as it is so called, was made. The Planning Board further elaborated that this would prevent another

dead end street. Notwithstanding that, the City went ahead and permitted the present owners to go ahead and develop Sandra Avenue to a point at least 750 ft. northerly from its intersecting bounds with Park Avenue South. Prior to this, the length of the dead end street, upon my information, was 500 ft. In any event, the permitted development on Sandra Avenue which has been accepted, to my understanding, as a public street, notwithstanding the Planning Department's recommendation, has been to a length of 750 feet northerly from Park Avenue South. There are many dead end streets in the City of Plattsburgh. If the City has permitted the builders to go ahead and construct this street, knowing that it was a dead end street when they permitted the construction of homes on it, it is no different than they have done in many other instances where there are dead end streets. There is no compelling reason why this is in the public interest to have this street connected with the Terrace West driveway, so called. The only interest, really, that would be served would be the development of our additional lots by the owners of the property that developed Sandra Avenue to the point where it now is. In other words, what is being sought to be done here is to take private property owned by Terrace West, Inc. to benefit private builders who own Sandra Avenue property. This is not in the public interest but only in the interest of those developers.

Additionally, the whole situtation was created by the City favoring those developers over the previous owners of the property, who had attempted to do the very same thing that is develop the property up to a distance of 500 or 750 ft., but were turned down by the City because it did not meet the Planning Department requirements. The City has fought, and has in fact, overrode the Planning Department recommendations and has permitted the present

development. They now seek to take our property for the benefit of these private developers. I think that they have indulged these private developers enough and they should not, under the guise of a public purpose or benefit, take our property. I believe that the condemnation proceeding is purely for the benefit of a private purpose and not a public one."

I am probably remiss in not asking Mr. Miller to provide us with a description of the property prior to receiving remarks. Mr. Miller, could you give us a description of the property, for the record.

Mr. Miller: In addition to the legal description that was previously read, I have I believe, our best description. Basically, it is a parcel of land sixty six feet wide and varying in length between 310 feet on the southern boundary and 320 feet on the northern boundary; the length of the parcel being generally arranged in an east-west direction and it is approximately 400 feet from the southern boundary of Cornelia Street. I realize you may not be able to see these accurately from the rear, but basically, it lies in the westerly portion of the City.

Mr. Miller: Do you want to go into . . . .

Mayor: Could you give us some of the history as to how we got to this stage?

Mr. Miller: Let me just say this, and going beyond the description. The purpose of the proposed acquisition of this parcel is to provide access to Sandra Avenue, a street which has been subdivided, with the stipulation that access is to be provided at both ends for vehicular traffic and for the looping of the water lines. The length of the proposed subdivision or the subdivision that is involved in this acquisition is approximaty 110 feet from Park Avenue West

to Terrace West, so called. The use of Terrace West will not change. It presently is used as a vehicular access to the Terrace West Apartments. That will not be modified by this. There may be additional traffic; in fact, we propose additional traffic over this easterly portion of that area when it becomes a City street. Existing in this sixty six foot parcel is a sanitary sewer which is owned by the owners of the apartment and connects into the City sanitary sewer system on Cogan. There would be no change in the use of that. There would be no additions to it and there would be no modifications to it. The surface area would be modified to upgrade it to conditions of City streets, specifically the addition of curbs and pavement gravel for asphalt surface. The . . . . in addition to that, another significant feature would be other than adding the water line. . . . that is, a water line added from the end of Sandra Avenue to the existing one on Cogan. This would be what we call looping the water line. In other words, the water line would be connected at both ends of the street; that is a requirement of the Health Department and it's also for fire safety. The Health aspect is an 1100 foot dead end line large enough to carry fire flows, would end up with water that would become stagnant, and perhaps could become a health problem. This is the interest of the Health Department in that line. The interest of the Engineering Department is that by connecting these lines at both ends, you end up with a greater hydraulic capacity, which is significant for fire flows, also, in the event of a failure of force, then you have an alternate problem of service . . . water service to the area. And that is also our concern and interest in having the street connected at both ends; it's safety, and also convenience.

I would like to read some articles out of the Sub-Division Ordinance the City passed May, 1973 and which

we are currently operating under. I'm going to read Paragraph 5.2.6. The caption is Dead-End Streets.

"The creation of dead ends or looped residential streets will be encouraged wherever the board finds successful development will not interfere with the traffic circulation in the area. In the case of dead end streets, where needed or desirable, the Board may require the reservation of a 20-foot wide easement to provide for continuation of pedestrian traffic and utilities to the next street, in addition to the requirements of Article 5.3."

The next Paragraph I'd like to read is Article 5.2.7, Street Connections. "Subdivisions containing twenty (20) lots or more shall have at least two street connections with existing public streets, or streets shown on the Official Map, as such may exist or streets on an approved Subdivision Plat for which a bond has been filed."

At this point, I'd like to comment that there are twenty-five lots in this approved subdivision. Now the third and final paragraph I'd like to quote from of the Sub-Division Ordinance is 5.3.9, Dead End Streets (Cul-De-Sacs)

"Where dead-end streets are designed to be so permanently, they should, in general, not exceed 500 feet in length, and shall terminate in a circular turnaround having a minimum right-of-way radius of 50 feet and pavement radius of 40 feet. At the end of temporary dead-end streets a temporary turnaround with a pavement radius 40 feet shall be provided unless the Planning Board approves an alternate arrangement."

I cite those portions of the Sub Division Ordinance as considerations the Planning Board had to take into account for approval of the sub-division.

Moving on to other considerations. One of economics. For the full development of Sandra Avenue from Park

Avenue West to the end of the parcel which is the southerly boundary of Terrace West, a sixty-six foot width. With 25 lots as presently approved and for the value of the eleven lots that have been developed, the average of those assessed values is $64,900. each. Projecting that to the full 25 lot development, you have an extension of the value of $1,622,500 on the assessment. If you were to...and now we are getting into assumptions, but if you were to allow that...undeveloped, those lots would be worth $8,000.00 each; you would have a value of $2,000 in assessment or the proposed development would bring an increase in value of assessed property of $1,422,500. The City has invested in this development at present, or at the end of this construction season, approximately $35,000 in storm sewers and will have, when the full length of street is developed, an investment in pavement for the surfacing of approximately $16,000. That's a total of $51,000 on Sandra Avenue for the full 1100 feet. We have invested $2,250 in appraisals to establish the value of this parcel on Terrace West and I estimate that to bring it up to City standards, an additional investment of $14,000 would be required. It would be our maximum investment which would include other improvements in the general vicinity, but generally would be related to this acquisition. On the subject of economics, I asked the Assessor to first establish the value of the average lot developed in the subdivision to date...the eleven properties that have been developed...and that averages $64,900. If we talk in terms, as we may later, about the restriction on the last six lots that assessed value would be extended to $381,400.

The question of development of Terrace West as being an advantage to the developer of this subdivision and I have these comments to present.

1) There is an existing agreement that the developer will pay to the City the amount of $5,000. to defray the costs and that he would also install the required water line from the newly developed Sandra Avenue to the existing water line on Cogan Avenue, and I believe that would be approximately $2600. for a total cost to the developer of $7600. for improvements to this subdivision. WE have hired an appraisal of the value of this parcel, it is Northeast Appraisers, and the amount that they appraise the current value of this parcel to be is $3,700. That's available for inspection.

Concerning the social impact of this acquisition, we feel that they are essential to the safe and convenient access for the permanent residents that will occupy this street as a matter of good planning, and considering the impact... the present driveway services a total of 96 units in this apartment complex and, of course, the apartment complex is served by Healey Avenue as well as Terrace West. The addition here is twenty-five dwelling units at full development and of course, it would be served at two ends as well.

As far as technological change there is (inaudible) after the improvements are made in that the City street will be placed in existing driveway use to the same purpose. There will be no change in its use.

Present status of this situation is that the subdivision approval as granted by the Clinton County Health Department requires the looping of the water line. I believe that for adequate fire flows and good engineering practice that the water line is also necessary. As previously quoted, from subdivision ordinances, I believe it's clear that adequate service access is also required, as well as the specific requirements of the subdivision ordinance.

The impact on the present owner as we view it is that the present use that it puts this property to will be continued and that the detriment would be the possibility of additional traffic on this portion of the street. The City, in this proposal would acquire the parcel, improve it, maintain it, and in addition would acquire the existing sewer line and maintain that as a City sewer, although it would continue to serve the purpose it presently serves. The City would reimburse the owner for the appraised value of the property and in addition, the property would go off the tax rolls. So the impact on the present owner, at least in my view, is not severely adverse.

The history of the parcel, in general—in total, is basically. It was acquired by Messrs. Rothman & Feldman in 1957 and in 1959, and in 1970 it transferred this portion to Terrace West, Inc. and at the same time, transferred a 66 ft. wide by three hundred and fifty foot parcel, the portion of which we are discussing tonight. In 1971 the Rothman & Feldman Company presented to the Planning Board a request to subdivide this parcel here and the Planning Board at that time recommended that Terrace West could be deeded as a City Street to avoid a turnaround and to facilitate the flow of traffic. At that time no approval of the subdivision plan was made and in 1972 Rothman & Feldman again submitted plans for approval. The plans were reviewed and again, no approval was given. At that time they did show a connection but the plan was never approved. In July, 1976 the Planning Board started reviewing the plan presented by Mr. Barnett and the tentative approval of the subdivision with the provision Terrace West street be connected to the acquisition. In 1976 there was an extended amount of correspondence and it goes on at great length which is a matter of public record and I'd be

happy to go over it but I gather you'd rather not go through a lot of details.

Alderman Poitras: I'd just like to ask a question. In listening and recognizing the plan, this is nothing more to us right now that could be identified as a street, although its considered to be a Drive for Terrace West. Is that correct? But it's not a paved area that you would see for regular vehicular use in Plattsburgh.

Mayor: That's right.

Alderman Poitras: Do I make myself clear?

Mr. Miller: Yes, I understand what you're saying. Yes, it is a paved area.

Alderman Poitras: So it's not a piece of property that can be built on or anything else but it's a piece of property used as access and regress to the facilities that are erected there...but it's private.

Mr. Miller: Yes.

Alderman Poitras: And so it's no different than it would be if the city owned it, except that they would plow the snow, maintain the street, pave it, put in the curbs, streetlights. Now exactly...the Board of Health. Are they mandating that we do not allow a dead end street of this nature as it exists right now?

Mr. Miller: They're not saying that the street has to be connected. They're saying that the water line has to be.

Alderman Poitras: So without...(Inaudible) we can't comply with the mandate of the Board of Health. So that now we're in violation of a guideline or an ordinance or law set by the Board of Health. I don't think it really leaves us much of a choice. If we don't own it, then we're in violation of the Board of Health and if we own it, then we maintain it, pave it. I don't see personally any real detriment to anybody other than the people living in the area.

Alderman Poitras: Am I right?

Mr. Miller: I would share that view.

Alderman Poitras: So if I may ask one more question. What is before us to (inaudible) and we have...how long...to prepare your determination?

Corporation Counsel: You have three months to prepare your determination.

Alderman Poitras: If I may, Your Honor. May I be excused because I have another appointment.

Mayor: We have another public hearing but that's alright. You may be excused. Is there anyone that wishes to address the Council?

Woman: Is Terrace West in violation of the City Ordinance?

Mayor: Would you identify yourself please?

Woman: Lena Wytkowski.

Mayor: No they are not apparently in violation of the City ordinance.

Alderman Stewart: In regard to the street, as I was looking at the situation. The developer will pay the $5,000 and the water line will be connected to Cogan Avenue. What about the development of the street itself? In conjunction with other developments where they put in the curb and the sub base, before the area is turned over.

Mr. Miller: The development of surface improvements would be at taxpayer's expense.

Alderman Stewart: That would be the City's expense?

Mayor: How about the sub-base that is normally done by the developer?

Mr. Miller: That would be done by the...

Mayor: By the developer. We would put in the tar-mac.

Alderman Stewart: We would put in the tarmac but the developer...but the curbs would be put in by the developer?

Mr. Miller: That's not my understanding.

Mayor: What is the understanding?

Mr. Miller: That the City would put in the curbs.

Mayor: That we would put in the curbs? In this development?

Norman Dame: Not in this development; only in this particular street. Because it's not really part of this development on this particular 300 foot section.

Mayor: Then the regular laws don't apply...?

Mr. Miller: Pardon?

Mayor: The regular subdivision laws don't apply in this case?

Mr. Miller: Well, first of all, that's correct. The spelling out of the street improvements are not applicable to Terrace West, since they're not improving Terrace West. The City stipulated that the developer...the initial stipulation was that the developer purchase from another private party, a parcel of land and dedicate it to the City and in that stipulation there weren't any requirements for improvements and it got quite involved and it's now currently my understanding that the requirement is that they pay this money to the City which would defray the cost of the acquisition and perhaps, some of the cost of improving it. That's neither here or there...they are paying a specific amount and making a specific improvement outside the area they are subdividing.

Mayor: Well if we do acquire this piece of property, we're just talking about curbs ending at Sandra Avenue.

Mr. Miller: Yes.

Mayor: The subdivision law would only apply, or as much as we're applying of it, would end at Sandra Avenue, the northwestern end of Sandra Avenue.

Mr. Miller: Right. It is not mandatory that the curbs be placed but to make it a city street up to current standards,

we would ask that funds be made available for the development of the curbs. But, we've got a lot of streets without curbs. But I'm specifically saying I recommend curbs in this area.

Alderman LePage: You say that the City would have to own the property in order to loop the water line? I was just wondering if anyone had ever approached the present owner for an easement to put the water line down there. Do we have any past history or...?

Mr. Miller: Yes, There has been a great deal of...

Alderman LePage: Just moving the water line now.

Mr. Miller: We've talked about that.

Alderman LePage: And what were the results?

Mr. Miller: Unsuccessful negotiations and that's why we're in this condemnation proceeding. We've just not been able to come to a meeting of the minds between the two parties involved.

Alderman Stewart: To go back to my original question in regard to the particular piece of red area. The utilization of that piece of land is solely for the development of Sandra Avenue extension and realistically in approaches that we normally take for the development of the last six lots that has to be purchased and it's technically a part of the development and the purchase is for the utilization of the development of that area. And recognizing the financial straits the City finds itself in on limited construction expenses, I wonder...to go any farther than with the pavement is going to be a tax on the taxpayers just to do the paving in that particular area, let alone the grading. The surface that's there has to be torn up and a new sub-base has got to be put in and curbs have to go in for control of water in the streets and so it doesn't spill over on somebody else's property. It should be a part of the job,

because either we do it or they do it and evidently they haven't been able to do it but if they made the purchase themselves, they would have to do it before they could turn the street over to the city.

Mayor: I think this is why the developer has given the City $5,000.

Alderman Stewart: Well he'd still have to purchase the land plus do the upgrading if he had purchased it himself.

Mayor: It was my understanding that the developer was going to put the curbs in.

Norman Dame: I'm Norm Dame; I represent the developer. We sent a letter, sent to the Mayor and Common Council, a letter dated August 3, 1978 in which he agreed to reimburse in the amount of $5,000. to use for the expenses of acquiring the property and in addition to that to connect the water main to the northerly end of Sandra Avenue. That was the extent.

Alderman Stewart: But in relation to the true reality of the situation you...if you were to purchase the same in the development itself and it became a part of the development, in order to meet the subdivision development code you would have to bring it up to sub-base and add the curb and then we go in and pave. But you would have the purchase price, plus the fact that you've got to put in the water line, plus the fact that you'd have to put in the sub-base and the curbing.

Norman Dame: Well first of all let me give you a little history. When we originally submitted our subdivision plan it was to have a dead end street in the development and the plan showed and the City ultimately decided that they wanted to connect the streets and required that before this development could go beyond the twenty lots, that we would be required to somehow gain access to that area.

The purpose of this is to develop those additional six lots and that's going to mean a lot more money for the City. And when Mr. Wolfe said this was being done for private purposes he was wrong. This development is going to provide a substantial increase in taxes for the City and permit six additional families to live on that street and in addition provide access to those people who are already living there on those twenty lots, from Sandra Avenue to Cogan Avenue without having to turn around and go back over to the corner.

Now, even assuming no further development is done. I'm not sure the City wants to leave the situation as it is now; even if those additional lots are not developed. Because, you're going to end up with a dead end street which apparently you don't want. We don't have any objection to it, by the way. If you want to permit the development of those additional six lots and have a turnaround there, we have no objection to that . . . . . (inaudible) . . . $5,000. plus the cost of installing that water line. However, you have imposed the requirement and we are trying to comply, but I don't think you are going to be happy, even if those additional six lots are developed. I don't think you're going to be happy with the water line the way it is now.

Alderman Stewart: So to retrace the position. Originally a permit was granted to develop to the five hundred foot limit. Then an extension of two hundred and fifty feet was granted for a total of seven hundred and fifty feet.

Norman Dame: No, that's not quite true. Initially, as I recall, they gave us permission to develop just two lots on the corners on the two corners of Sandra and . . . . . .

Mayor: Mrs. Jackstadt, the Vice Chairman of the Planning Board is present and I'm sure she could . . . . .

Norman Dame: Yes, Yes. I'm sure she could answer that. And then there came a time when the City approved another twenty lots which would take you I don't know how far back and then said before they approved the development of the additional six there had to be some kind of access back there because of some regulations either that they had imposed or guidelines that they had. I don't know how hard and fast those guidelines are. I don't know whether its mandatory they have access to there.

Alderman Stewart: Well, to return back to the original point and I've got to go back to the Engineer. I think you made a statement that it would take about $14,000 to bring the access road up to standards. That would increase . . . . . that would be the curbs, the sub-base and the pavement.

Mr. Miller: Yes.

Alderman Stewart: And the street lighting.

Mr. Miller: You know we've got some problems with some other residents over here on Cogan and we've got that in there. So that the project is larger than just the minimum amount of work. A minimum would be to leave it as it is and with a patch over the water . . . .

Alderman Stewart: But it . . . . .

Mayor: Does that include . . . . . (inaudible) to improve the . . . . (inaudible)

Mr. Miller: Yes. We have some additional work within the general area . . . .

Alderman Stewart: And that's in there so the figure is inflated by a certain amount but the percentage . . . .

Mr. Miller: By about . . . . .

Alderman Stewart: So we'd be talking roughly, about $7,000. But in regard to that particular section in order to have a true development it has to done. And if any

developer were to take that to develop it themselves, they would have to pay the fee of purchase, whatever that would be negotiated, and then they'd have to do the water line and the street upgrading to the degree of the sub-base and the curbs, if that were a private development. Am I right? Under our present code—the subdivision law.

Mr. Miller: Well really, the subdivision ordinance doesn't address directly, the cost of development outside of the area to be subdivided. It indirectly addresses it in the paragraphs I cited before for access. It's then been our practice, at least in the last five years that I know of, that the Planning Board and the developer do negotiate off-site improvements that are to facilitate that development, but they're not hard and fast, as far as the rules and regulations.

Alderman Stewart: But in recognizing the financial aspects of the City of Plattsburgh and the problems that we've had in other sub developments, actually we're committing more into a particular area than actually would be the case if it were done privately.

Mr. Miller: Well I don't think there is a yes or no answer. I really don't.

Alderman Stewart: And that's something that we've been trying to avoid in the present budget years, is to stay with the minimum that we can. I have no objections to the upgrading of the street and the paving of it, but I'd like it at the conditions that it would normally be developed by the developer before we take it.

Norman Dame: Except Jack, we don't own that property.

Alderman Stewart: But you don't own any street. Once you've got it you turn the ownership back over to the City after you bring it up to grade. That's the way it's usually done.

Norman Dame: But if you own the property, and then you want it dedicated to the City then you're required to meet certain requirements. But we don't own it and any improvements you make are made prior to having it transferred to the City. So we don't have a responsibility to develop that at all . . . . to develop that street. Obviously, we'd like to do it because we'd like to move ahead . . . . . (inaudible). Incidentally, Mrs. . . . . .

Mayor: Is that from the Planning Board?

Norman Dame: This is an abstract apparently and there is an entry date here of March 7, 1977 with a letter from the City Engineer to the Common Council requesting the acquisition of Terrace West to provide (inaudible) being pursued by the City in 1969 . . . . (inaudible) to develop the first 750 feet of the street and no (inaudible) to the issue of the last eight lots until Terrace West were acquired by the City. So that comes in to March 1977 when they gave permission to the developers to develop the first twenty lots, they did indicate that they would acquire that street before they would develop the additional six or eight.

Mayor: Mrs. Jackstadt, is that a synopsis of the Planning Board . . . . .

Mrs. Jackstadt: Yes, Sally Carey . . . . .

Mayor: Could I have that copy for the record?

Mrs. Jackstadt: I think Mr. Miller . . . . .

Mr. Miller: Yes. Actually I did that and I have copies . . .

Norman Dame: And we did agree as I pointed out before to pay $5,000 toward the acquisition of that.

Alderman Stewart: I have no objection to that, and I understand the $5,000 commitment. The situation being though, that in order to develop those lots and to fulfill the requirements of the Health Department, the Fire Department and the Planning Board, the acquisition would

be necessary either by us or by you, for the street. And in order to purchase the street, and then the City take it over it has to be upgraded to City standards. I don't know if that street, paved the way it is, would withstand . . . . and I've been up through there . . . . would withstand any heavier traffic than it's got right now. It would all fall apart, probably. Because it's a substandard drive . . . it's just a drive now and it's going to become a street and you're going to be running equipment across it and plowing that and maintaining that and so on, so the street has to be upgraded to the specification of the City.

Norman Dame: You see, we're not going to acquire it, Jack. We had already attempted to do that without success. Initially, Louis Wolfe wanted $5,000 for the property and then in addition he wanted us to transfer to him a triangular parcel which would have ruined the last lot to the extreme northwest line . . . southwest line.

Alderman Stewart: Yes, I know that particular situation—I'm familiar with that.

Norman Dame: Then when negotiations on that failed and we offered to pay him $5,000 and transfer the lot . . . . transfer the triangular parcel to him . . . he then decided he wanted $10,000 and as Mr. Miller has told you, it has only been appraised at something in excess of $3,000 so as you can see, those negotiations failed. Now what's happened is the only way you can acquire the street is if the City wants it for public purposes. This is a public purpose. It serves Sandra Avenue up there . . . those twenty-five or twenty six lots here. We don't have any obligation to improve a City street and we're not going to acquire that property. The City is. Now, if I could make just another point too. When we were here in 1977 and had our discussions with the various members of the Common Council and the

Mayor at that time and the Corporation Counsel, it was decided that the City would acquire this property and they gave approval for us to develop the initial twenty lots and then gave us tentative approval to develop the additional six or eight after the City acquired the property.

Alderman Stewart: When you acquired the property. You were still in negotiations . . . you were still in the process . . . . the process of negotiations . . . . in 1977 for the acquiring of that . . . . .

Norman Dame: Yes. But then there came a time when the City decided that it would acquire the property by condemnation and the only reason you're here today is because it's now determined that this public hearing is necessary. But you have actually already made the decision to acquire the property and we paid you money pursuant to that decision and pursuant to that agreement and we agreed in addition as part of the bargain to install a city . . . . to install a water line.

Alderman Stewart: We didn't . . . . . let me correct something there. We didn't agree to acquire that property. We agreed to start the process. The agreement to acquire is still to come. In other words, we're at the point now we're looking at it.

Norman Dame: Well, I disagree . . . . .

Alderman Stewart: The final vote was yet to come.

Norman Dame: Well, I disagree . . . . .

Alderman Stewart: After the public hearing. We can't commit before we have our public hearing to get the basis of the information.

Mayor: At the time we passed the resolution, the public hearing was not a part of the law. Maybe Mr. Robinson can clear that up.

Corporation Counsel: The law requirements changed last year and that's why we are required to have a public

hearing. Basically, it eliminates or is intended to eliminate, the arguing of the question of necessity before the Court, but rather, to have it resolved by the public hearing and findings by the Council as to whether or not this is feasible and if it is determined yes or no, to go ahead. The status of the law, prior to that last year, was that the City would go ahead with condemnation proceedings; objections could be stated in Court rather than at this public hearing.

Norman Dame: I think if I understand it, and perhaps Tom has said it, it did adopt a resolution to acquire the property by condemnation and then after it did that some time later, a long time passed, and the law changed and that is why we are having this public hearing.

Mayor: We do have a resolution to that effect. While we're on that subject, to clear the record and to clear my own name if I may. Last year, Mr. Wolfe made the accusation to me publicly that when I was on the Council as an Alderman I voted against accepting the street and now I was showing favoritism to the developer trying to get it. And I have here a copy of the Minutes of the Regular Meeting of Council on July 9th, 1970 with a resolution by Alderman Branon seconded by Alderman Akey to accept that street. One provision on it was that final approval was subject to receiving a commitment from Mrs. McDonough in connection therewith, and I voted in favor of the resolution, not against it. It was passed by a 4-2 vote. Alderman Ryan and Alderman King voted in the negative. On July 30th, 1970 Mr. Wolfe appeared before the Council and said that he could not get the clearance from Mrs. McDonough and therefore requested his deed back. So just to clear my own name if I may while we're on that subject I'd like it entered into the record that I have voted since 1970 to accept that street.

Mayor: It has been an involved affair.

Alderman Ryder: Go ahead and ask him about the cost.

Alderman Blumette: George, what is the cost to the City for development of that piece of property. What would it cost the City?

Norman Dame: It was in your summary of costs.

Mr. Miller: Specifically, Terrace West?

Alderman Blumette: Yes.

Mr. Miller: Okay. I have, and incidentally, this is in the Capital Budget for this year, an estimate of $14,000 for improvements in this area that would be capitalized and paid for by tax dollars; the number includes a significant amount of work in the area that is not specifically in this parcel. In other words, we go down Cogan Avenue in both directions quite a ways because we have additional work as far as improvements for street resurfacing, and such. I didn't think of it as a separate cost for this specific parcel so I would have to say that I would think that approximately 50% of that amount would have to be put in here for curbs, gravel base . . . . As I say I'm not very accurate on that . . . . . I did look at this very quickly so my estimate is not anything that's going to be entirely . . . . . .

Mayor: Is there any other testimony?

Woman: How much would it reduce the value of the Terrace West property? How much taxes would be lost from making it more accessible?

Mr. Miller: The loss of tax revenue from Terrace West?

Woman: Yes.

Mr. Miller: It's approximately . . . . well, at our appraised value of $33,700, for easy calculations say at $10.00 per thousand, it would be 3.7 x 10 or approximately $37.00 per year. City property taxes at the rate of $10.00 per thousand, that rate is really . . . . .

Woman: Does Terrace West agree with your figures?

Mayor: That's something we will address later on . . . that's not up for this hearing. Mr. Dame, you had something further you wanted to add?

Norman Dame: I just wanted to ask George, what would the tax base increase be for the development?

Miller: In answering your question, I'd also like to make a comment but first let me answer the question. This is a memorandum given me by the Assessor at my request. The assessed value of the six remaining lots based upon the average of the eleven lots . . . the assessed value of the eleven lots that are currently developed in that subdivision, would be $64,900 per lot times 6 which would extend to $389,400, if that answers your question.

Norman Dame: Yes, it does. What is it in actual tax dollars, George.

Mr. Miller: Again, it's easy for us to calculate at $10.00 per thousand, it would be three thousand eight hundred and ninety four dollars. That's the property tax and does not include the school tax. And ten dollars is not the correct rate either, but I'm just using it, but I think it's approximate . . . . . I'd like to make a comment if I may concerning the emphasis that's been placed on the remaining lots. It is my impression from my recollection of reviews with the Planning Board that the intent originally to withhold approval on the lots was consistent with the subdivision ordinance and also gave the City administration a plan for leverage on the developer at that time who at that time to give him an incentive to make the improvements. That was the position prior to these other developments and I mention that now because I get the sense that we're now thinking that these six or eight lots...now six lots...are in question and I'd like to say the question is from my point of view, it's not whether or not those lots

should or should not be developed but I think the question is "How can we conclude the acquisition of our requirements to loop the water line and provide vehicular access?" I don't think we can stop in the middle and be successful. I think that point should be brought up.

Mayor: Is there any other testimony to come before the hearing.

Alderman LePage: I have one more question Your Honor. I was just wondering if the City would be liable for a lawsuit. Say it didn't jibe. Would the City be liable for a lawsuit if it didn't go through with this end of the agreement in acquiring the property?

Alderman LePage: He says we have an agreement and Jack says we've just started the process. I just want to get that straight in my head.

Corporation Counsel: I don't think I don't think we should discuss publicly in the presence of the prospective plaintiff's in the action . . . . .

Alderman LePage: Excuse me for asking.

Alderman Stewart: I'd like to know the answer to that before I make any decision, I know that.

Alderman Ryder: I would just like to point out something that Mr. Miller implied but didn't really say and that's that the acquisition of this particular piece of property and the fact that it would become a City street if that's what eventually happens would be to the betterment of the 94 residents that live in Terrace West also. I think that you feel that also, don't you? You didn't really say that but it would give the 94 people who live there in the apartments, double access to their property . . . . .

Mayor: Improved access.

Mr. Miller: Yes.

Woman: Isn't that a matter of opinion.

Mr. Miller: I think what I said was that there is no change in the use of the property contemplated by this acquisition.

Mayor: George, it doesn't have to go on the record . . . . . Is there anymore testimony to come before this hearing?

There being no further testimony, the meeting was adjourned.

JOHN L. IANELLI, Mayor

The foregoing Minutes of a Public Hearing of the City of Plattsburgh held on July 26, 1979 are hereby transmitted to the City Clerk for the filing thereof among the public records of the City Clerk's Office in accordance with Local Law No. 19 of 1942.

Dated: July 30, 1979

JOHN L. IANELLI, Mayor

Public Notice of Determination and Findings.

PUBLIC NOTICE

Pursuant to Eminent Domain Procedure Law, Section 201, on July 26, 1979, a hearing regarding the Sandra Avenue Improvement Project, a proposed public project, was held to inform the public and to review the public use to be served by the project and the impact of the project on the environment and the residents of the locality where the Sandra Avenue Project will be constructed.

On August 16, 1979, the condemnor, the City of Plattsburgh, New York, made its determination and findings based on the hearing. A copy of the determination and findings will be forwarded to any interested person without cost upon written application to the City Clerk, City of Plattsburgh, City Hall, Plattsburgh, New York 12901.

A synopsis of the determination and findings follows:

1. The City of Plattsburgh has determined and found:

a. The Sandra Avenue Project will provide access from Terrace West for vehicles and provide a water line to loop a city water line to provide a better flow.

b. The Sandra Avenue Project will be constructed in a parcel of land having dimensions of 308.86 feet by 66 feet west of Cogan Avenue and approximately 400 feet south of Cornelia Street, and avoid Sandra Avenue being a dead end street at its presently northerly terminus.

Public Notice of Determination and Findings

c. The Sandra Avenue Project will affect the environment and residents of the locality in the following manner: The effect on the environment will be minimal since no change in use is contemplated by the Project. The area sought to be condemned is presently used as a driveway to the Terrace West Apartments and as a public street it will be available for the same use. The use should result in an increase in traffic.

BY ORDER OF THE COMMON COUNCIL.

CITY OF PLATTSBURGH, NEW YORK
By: ALINE G. COTE
City Clerk

Determination and Findings.

DETERMINATION AND FINDINGS OF THE COMMON COUNCIL OF THE CITY OF PLATTSBURGH RELATIVE TO SANDRA AVENUE IMPROVEMENT PROJECT.

As a result of a public hearing held July 26, 1979, the Common Council of the City of Plattsburgh makes the following findings with respect to the Sandra Avenue Improvement Project:

The public use, benefit or purpose served by the proposed public project is to use a portion of the Terrace West driveway as a city street to provide access to Sandra Avenue for vehicles and water line. No change in present use is required. Existing traffic to Terrace West Apartments will be maintained. Existing Terrace West Apartments sanitary sewer lateral will remain in service "as is" with no added connections. The City will maintain a portion in the street after acquisition. The additional water line will provide a loop to Sandra Avenue for better flow.

The approximate location for the proposed project is a parcel 308.86'x66' west of Cogan Avenue approximately 400' south of Cornelia Street.

The reason for the selection of this location is the existence of Sandra Avenue without an outlet at its northerly terminus and to avoid Sandra Avenue being a dead end street at its northerly terminus. This will provide a convenient and necessary right of way to connect the northern end of the water line on the Sandra Avenue development to the existing water main in Cornelia Street providing for loop service to insure adequate fire flows and to prevent water stagnation in a dead end water line.

Determination and Findings

The general effect of the proposed project on the residents of the locality would be to provide access to Sandra Avenue at its northerly terminus and to provide a better water supply in the area. The effect on the environment would be minimal since no change in use is contemplated by the project. The area sought to be condemned is presently used as a driveway to the Terrace West apartments and as a public street will be available for the same use.

Other relevant factors are that the Subdivision Ordinance of the City of Plattsburgh requires subdivisions with 20 lots or more to have connections with existing public streets. The acquisition of the subject property will permit compliance with this requirement.

The use of the subject property for the public will have some impact upon the present owner in that there should be an increase in traffic. On the other hand, the City of Plattsburgh will have the duty of maintaining the street and existing sewer. The City will pay the owner for the property sought to be condemned and will lose tax revenue by devoting the subject property to public use.

The City's present investment in the Sandra Avenue Subdivision is the storm sewer and pavement is approximately $47,000.00. The developer has paid $5,000.00 toward the expense of the City and has agreed to pay the expenses of looping the water line to Cogan Avenue, placing gravel on the portion of the land sought to be condemned, and to install curbing on the southerly side of such property, all in accordance with the specifications of the City. The additional cost to the City to acquire the property and to make the necessary improvements should not exceed the amount received.

Determination and Findings

The full development of the subdivision would produce 25 lots with an anticipated increase in taxable value when residences of comparable quality are constructed of $1,622,500.00, as compared to an assessed value as undeveloped lots of $200,000.00, or an increase in assessed value of $1,422,500.00.

It is therefore determined by the Common Council of the City of Plattsburgh that the subject property should be acquired by the City of Plattsburgh for the purposes above stated.

Resolution.

OFFICE OF THE CITY CLERK
CITY HALL
Plattsburgh, New York 12901
Aline G. Cote
City Clerk
Area Code 518
563-7702

August 21, 1979

At a Regular Meeting of the Common Council of the City of Plattsburgh, N.Y., held August 16, 1979, the following resolution was adopted:

By Alderman Ryder; seconded by Alderman Poitras:

Whereas, the City of Plattsburgh conducted a public hearing on July 26, 1979 relative to Sandra Avenue Improvement Project, and

Whereas, the Common Council has determined the Public use, benefit, or purpose served by the proposed public project is to use a portion of the Terrace West driveway as a city street to provide access to Sandra Avenue for vehicles and water line, with no changes in present use required, and

Whereas, the reason for the selection of this location is the existence of Sandra Avenue without an outlet at its northerly terminus and to avoid Sandra Avenue being a dead end street at its northerly terminus, and

Whereas, the Subdivision Ordinance of the City of Plattsburgh requires subdivisions with 20 lots or more to

have connections with existing public streets and acquisition of the subject property will permit compliance with this requirement, and

Whereas, the City has invested $47,000 in the Sandra Avenue Subdivision storm sewer and pavement, and the developer has paid $5,000 toward the expense of the City and has agreed to pay the expenses of looping the water line to Cogan Avenue, placing gravel on the portion of the land sought to be condemned, and to install curbing on the southerly side of such property in accordance with City specifications, with additional cost to the City to acquire the property and make the necessary improvements not to exceed the amount received, now therefore be it

Resolved: That the City of Plattsburgh, in accordance with the findings of the Common Council does hereby agree to acquire the subject property for the purposes stated, and the findings of the Common Council are hereby adopted, further

Resolved: That the Corporation Counsel is hereby authorized and directed to proceed with the acquisition of the Terrace West/Sandra Avenue property under the provisions of the Eminent Domain Procedures Law, further

Resolved: That a copy of this resolution be furnished the Corporation Counsel for his information and files, and further, that a copy of this resolution be furnished the developers, George Barnett, Jr. and Harry Payea, Jr.

Resolution

On roll call, Aldermen Stewart, Baughn, LePage, Blumette, Ryder and Poitras voted in the affirmative; no one in the negative. CARRIED.

CERTIFIED A TRUE COPY

ALINE G. COTE
City Clerk

(Seal)

Minutes of Resolution.

1561 RM 8/16/79

Mayor: We have the findings for the property on Terrace West/Sandra Avenue from the Hearing that we had two to three weeks ago, July 26th. You have all your copies so I won't read the whole thing. Could I have a motion adopting this finding, or a resolution adopting these findings, I guess that's the proper term Mr. Robinson?

By Alderman Ryder; seconded by Alderman Poitras:

Whereas, The City of Plattsburgh conducted a public hearing on July 26, 1979 relative to Sandra Avenue Improvement Project, and

Whereas, The Common Council has determined the public use, benefit, or purpose served by the proposed public project is to use a portion of the Terrace West driveway as a city street to provide access to Sandra Avenue for vehicles and water line, with no changes in present use required, and

Whereas, the reason for the selection of this location is the existence of Sandra Avenue without an outlet at its northerly terminus and to avoid Sandra Avenue being a dead end street at its northerly terminus, and

Whereas, the Subdivision Ordinance of the City of Plattsburgh requires subdivisions with 20 lots or more to have connections with existing public streets and acquisition of the subject property will permit compliance with this requirement, and

Minutes of Resolution

Whereas, The City has invested $47,000 in the Sandra Avenue Subdivision storm sewer and pavement, and the developer has paid $5,000 toward the expense of the City and has agreed to pay the expenses of looping the water line to Cogan Avenue, placing gravel on the portion of the land sought to be condemned, and to install curbing on the southerly side of such property in accordance with City specifications, with additional cost to the City to acquire the property and make the necessary improvements not to exceed the amount received, now therefore be it

Resolved: That the City of Plattsburgh, in accordance with the findings of the Common Council does hereby agree to acquire the subject property for the purposes stated, and the findings of the Common Council are hereby adopted, further

Resolved: That the Corporation Counsel is hereby authorized and directed to proceed with the acquisition of the Terrace West/Sandra Avenue property under the provisions of the Eminent Domain Procedures Law, further

Resolved: That a copy of this resolution be furnished the Corporation Counsel for his information and files, and further, that a copy of this resolution be furnished the developers, George Barnett, Jr. and Harry Payea, Jr.

On the roll call, Aldermen Stewart, Baughn, LePage, Blumette, Ryder and Poitras voted in the affirmative; no one in the negative. CARRIED.

During the roll call, Alderman Stewart interjected the following remark.

Alderman Stewart: Yes, Your Honor. There is an agreement with the firm that they would bring that particular street up to city specifications?

Mayor: Yes. I should have read that letter; we did get a letter from them, George Barnett and Harry Payea, the developers of the property which reads:

500 Cornelia Street
Plattsburgh, New York 12901
August 13, 1979

Mayor John Ianelli & Common Council
City of Plattsburgh
City Hall
Plattsburgh, New York 12901

Re: Sandra Avenue Subdivision

Gentlemen:

In an effort to bring an extremely distasteful and aggravating situation to a conclusion; we hereby agree, in addition to the Five Thousand Dollars already paid to the City a year ago and committment to loop the water line from the end of our street across land of others to Cogan Avenue, to gravel that portion of the land presently owned by Terrace West and to be condemned by the City in accordance with the city specifications and install curbing on the south side of said property.

Sincerely,

(Sgd)
George M. Barnett
Harry J. Payea, Jr.